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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 299

PAUL ROBERT COHEN, *Appellant*

vs.

THE STATE OF CALIFORNIA, *Appellee*

On Appeal from the Court of Appeal,
Second Appellate District, State of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

PAUL N. HALVONIK,
CHARLES O. MARSON,
[illegible] Market Street,
San Francisco, California [illegible],
ANTHONY G. AMSTERDAM,
Stanford University Law School,
Stanford, California [illegible],
Attorneys for the American Civil Liberties Union of Northern California

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

For half a century, the American Civil Liberties Union has had a single interest: defense of the freedoms guaranteed to the people by the Constitution. Preeminent among those freedoms is the right of free speech protected by the First and Fourteenth Amendments, "the very foundation of constitutional government."[1] Because the principles upon which appellant Cohen's conviction rests are inimical and full of danger to those of the First and Fourteenth Amendments, we thus respectfully move for leave to file this brief *amicus curiae,* urging reversal. The consent of the attorney for appellee has been obtained and his letter of consent has been deposited with the clerk. The consent of the attorney for appellant was requested but refused.

Respectfully submitted,

PAUL N. HALVONIK,
CHARLES C. MARSON,
ANTHONY G. AMSTERDAM,
Attorneys for the American Civil Liberties Union of Northern California.

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[1] *DeJonge v. Oregon,* 299 U.S. 353, 365 (1937):

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

BRIEF AMICUS CURIAE

I. INTRODUCTION

In this case, the Court is once again required to review the conviction of a political dissident under a criminal statute punishing breach of the peace. Like the Court, the American Civil Liberties Union has had long experience with these breach-of-the-peace laws. They are the sinks of American criminal and constitutional jurisprudence. Hundreds of times every day, in every State, their applications are the occasions of arbitrariness and injustice, harassment, ideological repression. In unparalleled fashion and degree, they are the chosen instruments for making law a nuisance to all those persons whom an officer of the law or a magistrate happens to regard as nuisances. They give color of law to ultimate lawlessness, to a state in which "lawmaking is . . . entrusted to the moment-to-moment judgment of the policeman on his beat,"[2] and "a person may stand on a public sidewalk . . . only at the whim of any police officer. . . ."[3]

Of course, the prosperous, white, well-groomed, well-shod citizen, so long as he avoids political assemblies and never expresses unpopular views in public, has no reason to encounter these laws, or even to know that more arrests are made yearly under their authority than for any other "crime" except drunk-

[2]Mr. Justice Black, concurring, in *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969).

[3]*Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965).

enness.[4] But where the poor live, or the black, the dissentient, culturally divergent, those whom policemen see as "subjects" rather than objects—or any whom youth, venturesomeness, wanderlust, social or political activism or bad housing cause to be upon the streets more than ordinarily often—the breach-of-the-peace laws are an ever-present, repressive force. They are the means by which authority (meaning the police and police-court judges) make "those people" toe the line.

This Court has seen a meager sampling of the consequences in a few dozen cases during thirty years. It has reversed breach-of-the-peace convictions of unpopular religious evangelists, unpopular political orators, unpopular protesters, Freedom Riders, sit-inners, street-marchers, black boys in a "white" park,[5] and, once, a black man having the temerity to argue with an officer who had arrested him for doing nothing illegal while waiting for a bus.[6] These cases are the barely perceptible tip of a tremendous iceberg. For every breach-of-the-peace conviction that

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[4] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967), 102. This statement relates generally to what the Task Force calls "disorderly conduct" laws—including breach-of-the peace and cognate statutes. See note 7, *infra*.

[5] *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Fields v. South Carolina*, 375 U.S. 44 (1963); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Thomas v. Mississippi*, 380 U.S. 524 (1965); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Bachellar v. Maryland*, 397 U.S. 564 (1970).

[6] *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

this Court has upset, there are literally tens of thousands of equally abusive and unconstitutional uses of the breach-of-the-peace statutes that the Court will never see.

For the most part, the statutes are enforced by summary police action: orders to "move along," arrests (later dropped, or escalated into more serious charges, such as resisting arrest), or the truncheon. These cases do not come to court at all. When breach-of-the-peace cases do come to court, the defendants are poor, the penalties small, appeal costs relatively large, and lawyers largely unavailable. So the cases terminate in the police court, and frequently in uncorrectible injustice.

This is not merely an A.C.L.U. view. The relevant Task Force of the National Crime Commission reached virtually identical conclusions. It found:[7]

> "These laws tend to embrace an excessively broad range of conduct, some of it dangerous, some merely annoying, some harmless, some constitutionally protected. While these statutes protect important interests, they often are excessively general and do not adequately discriminate and identify the kinds of behavior legitimately to be prohibited. . . .
>
> "These excessively broad laws are applied in excessively broad ways that lead to convictions

[7] *Op. cit. supra*, note 4, at 102-104. In the first two quoted paragraphs, the Task Force is speaking of "disorderly conduct" laws, a category composed principally of breach-of-the-peace statutes but also including similarly open-ended statutes punishing loitering, unlawful assembly and riot. In the third and fourth paragraphs, the Task Force speaks of all these laws and also of vagrancy laws.

for some conduct that properly is subject to criminal control and to convictions for some conduct that is harmless or should be protected. Some of these convictions are reversed, but not the overwhelming majority. There is little appellate review of the work of the often ill-trained magistrates who work with these vague laws. A New York study revealed that although over 70,000 disorderly conduct arraignments occurred in 1957 alone, there have been only approximately 150 reported opinions since the enactment of the statute in 1923.

. . . . . .

"Precisely because [these] . . . charges are so commonly relied upon by law enforcement authorities, as well as because penalties involved are generally minor, and defendants are usually from the lowest economic and social levels, they have proved largely resistant to scrutiny and change. Yet

> this is a most important area of criminal administration, affecting the largest number of defendants, involving a great portion of police activity, and powerfully influencing the view of public justice held by millions of people.

. . . . . .

"Improvements in laws such as these are of great importance. The high price paid for extending to the police wide and largely uncontrollable power . . . should be recognized. Foremost among its disadvantages is that it constitutes an abandonment of the basic principle upon which the whole system of criminal justice in a democratic community rests, close control over exercise of the authority delegated to officials to employ force and coercion. This control is to be found in care-

> fully defined laws and in judicial and administrative accountability. The looseness of the laws constitutes a charter of authority on the street whenever the police deem it desirable. The practical costs of this departure from principle are significant. One of its consequences is to communicate to the people who tend to be the object of these laws the idea that law enforcement is not a regularized, authoritative procedure, but largely a matter of arbitrary behavior by the authorities. The application of these laws often tends to discriminate against the poor and subcultural groups in the population. . . . And it is costly for society when the law arouses the feelings associated with these laws in the ghetto, a sense of persecution and helplessness before official power and hostility to police and other authority that may tend to generate the very conditions of criminality society is seeking to extirpate."

The broad-scale pernicious effects of these breach-of-the-peace laws have survived untouched by a dozen decisions of this Court reversing convictions under them in a dozen years.[8] Each decision has been narrow, turning upon the circumstances of particular arrests or trials, and leaving the basic structure of the laws unaffected. The same "excessively broad" character of the statutes that renders them inherently dangerous to civil liberties also makes it inevitable that most of the breach-of-the-peace charges which reach the Court will prove factually baseless or improperly administered in the trial proceedings, entail-

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[8]See notes 5, 6 *supra*.

ing reversal upon grounds that permit the laws to continue to exist and to be applied in countless other cases identical in all respects except that they are not appealed. So, if we could properly do so, we would urge the Court to make the present case the occasion of a broad constitutional decision, condemning California's version of the breach-of-the-peace concept, Penal Code §415.

We feel that we cannot properly do so, in view of the narrower grounds upon which reversal is here, as usual, required. For we recognize that there are complicating features about this problem of the constitutionality of breach-of-the peace laws. The very universality of the laws and the frequency of their employment reinforce the wisdom, in this context, of the Court's ordinary canon of constitutional adjudication, "not to entertain constitutional questions in advance of the strictest necessity."[9] Doubtless, that consideration has informed the Court's narrow dispositions of previous breach-of-the-peace cases brought here in recent years. However much we may deplore the seemingly ubiquitous abuses of the breach-of-the-peace laws and what appears to us their endemic susceptibility to abuse, we cannot deny a solid core of legitimate state interest in the maintenance of *some* form of "laws to protect the public from . . . boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes . . . or for public and other buildings that require peace and quiet to carry out their functions.

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[9] *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949).

. . ."[10] Therein lies the "dilemma" identified by Mr. Justice Black in his concurring opinion in *Gregory* v. *City of Chicago*:[11] the troublesome problem of accommodating such laws protecting public tranquility with the vital public interest in preserving free speech, all the more indispensable to public security[12] *because* speech "may . . . best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[13] With interests of such magnitude in the balance, long-standing traditions of the Court call upon it to "resist the pulls to decide the constitutional issues involved in this case on a broader basis than the record . . . imperatively requires."[14]

Accordingly, we shall urge reversal upon narrow grounds. However, with utmost deference, we think it important to emphasize that the policy against premature and unnecessary constitutional decision cuts two ways. Particularly in connection with a concept such as breach of the peace, whose inherent dangers to precious civil liberties have again and again materialized in demonstrated instances of violations of those liberties,[15] premature constitutional validation is to be avoided equally with premature constitutional inval-

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[10]Mr. Justice Black, concurring, in *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969).

[11]*Ibid.*

[12]See note 1, *supra*.

[13]*Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949), approved in, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

[14]*Street v. New York*, 394 U.S. 576, 581 (1969).

[15]See, e.g., notes 5, 6 *supra*. And see the passage quoted at note 7, *supra*.

idation. Frankly, we are worried lest, in disposing of the present case on narrow grounds, the Court should gloss over the more basic questions presented by laws such as California Penal Code §415, and thus inadvertently appear to approve such laws. We urgently hope that it will not do so. For this reason, in the following sections of this brief (Part II), we identify large constitutional issues that we believe are *not* necessarily presented here, and which we hope that the Court will make plain it is *not* deciding. In the final sections (Part III), we state the narrower constitutional bases for reversal.

II. THE MAJOR CONSTITUTIONAL ISSUES WHOSE DECISION IS UNNECESSARY

A. The Profanity Issue.

As we see it, this case does not present the question whether, consistently with the First and Fourteenth Amendments, a State may punish the utterance of a class of non-obscene "profane" speech. That is a question of considerable importance, fraught with the gravest difficulties. On the one hand, prohibitions of profanity have a long history in Anglo-American law and are widespread in this country. This Court has occasionally assumed their constitutionality.[16]

On the other hand, history makes plain that their origins lie in religious concerns that American governments may not constitutionally promote; and even today, the major interests that they serve are preven-

[16] E.g., *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952).

tion of moral affront and supposed prevention of moral corruption. Laws against obscenity may have some tenuous link to prevention of socially injurious *conduct*; laws against profanity appear, at least, to have none. Reconciliation of such laws with the First Amendment, particularly in cases where profanity is used to embody an idea that is indisputably one of political protest, therefore poses fundamentally troubling issues.

But two practical problems involved in the punishment of profanity make the question of its constitutionality yet more vexing. First, any crime which is constituted entirely by words—perhaps by a single word—creates inordinate possibilities of overreaching and abuse. One need not suppose that policemen are more frequently perjurious than other men to realize that, like other men, they may hear what they want to hear in the course of an excited conversation. The crime of profanity therefore makes oral controversy with the authorities exceedingly dangerous, and may operate forcefully to chill legitimate expressions of grievances by citizens.

Second, different subcultural groups in the American population have vastly differing linguistic conventions. Words that would clearly be perceived by some as "profane" are customary locutions for others.[17] The inherently arbitrary and discriminatory con-

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[17]The following excerpt of the reporter's transcript of a trial in Oakland, California, makes the point. The witness is a police officer who is on trial for physically and verbally abusing a group of youths:

sequences of a law punishing profanity in a culturally diverse community cannot be ignored.

For all of these reasons, we respectfully submit, the Court should not undertake to determine the constitutional status of "profanity" unless and until that question is squarely posed by some case which requires its decision. This case does not. For, although appellant Cohen's phrase "Fuck the Draft" may well appear to be a classic type of non-obscene[18] profanity, California has not sought to punish it as such. Rather, appellant has been convicted under a statute which, as authoritatively construed, punishes only one who "wilfully and maliciously incites others to *violence* or engages in conduct likely to incite others to *violence*." *In re Bushman*, 1 Cal.3d 767, 773, 463 P.2d 727, 730, 83 Cal.Rptr. 375, 378 (1970) (emphasis added). California Penal Code §415 is not a profanity statute, but a breach-of-the-peace statute; and appellant's conviction for its violation rests exclusively on

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"Q. Do you recall telling the driver of this automobile that if he didn't move the car you were going to break his windshield with your club?

"A. No. No, sir, I didn't tell him.

"Q. At no time?

"A. I told all them mother fuckers I didn't want no trouble, I didn't want no fight. I just told all them mother fuckers——

"Q. Now, did you curse them?

"A. No, sir.

"Q. Not at all?

"A. No."

[18]Notwithstanding the trial court's finding that "Fuck the Draft" is "'obscene' within the constitutional meaning of that word" (A. 20), it plainly is not. Whatever else may be unclear about obscenity, obscenity has something to do with prurient interest. And even Ovid, master of erotic personification, could not have made copulation with The Selective Service pruriently interesting.

the theory that "if it can be reasonably anticipated that certain conduct will cause others to disturb the peace, wilfully and maliciously engaging in such behavior constitutes a disturbance of the peace." (A. 28.)

Since California has not chosen to punish appellant for profanity, its constitutional power to do so is not in issue here. The only issues presented relate to whether California may constitutionally assert the specific power that it has in fact asserted, to punish the specific aspect of appellant's conduct upon which the assertion of that power has been exclusively based. In similar situations, this Court has many times reversed criminal convictions upon charges found to be constitutionally impermissible, while pretermitting decision of the question whether, on the facts of record, the defendants might constitutionally have been convicted of some other offense. E.g., *Garner* v. *Louisiana*, 368 U.S. 157, 164 (1961); *Edwards* v. *South Carolina*, 372 U.S. 229, 236 n. 11 (1963); *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 91-92 (1965); *Gregory* v. *City of Chicago*, 394 U.S. 111, 112 (1969); *Street* v. *New York*, 394 U.S. 576, 580-581 (1969); *Bachellar* v. *Maryland*, 397 U.S. 564, 569-571 (1970). Where, as here, the constitutionality of that other offense presents large, novel and difficult First Amendment questions, the same course should obviously be pursued.

In making this point, we do not ignore the argument which runs: "Profanity is not constitutionally protected speech; and, if it is not constitutionally pro-

tected speech, and if appellant used profanity, then he may not invoke the First Amendment to protect him against conviction for the profane words that he uttered, *whatever* may be California's asserted basis for punishing them."[19] This argument is simply wrong. For, even if it be true that the First Amendment does not forbid a State to punish profanity as such—if, in this sense, "profanity is not constitutionally protected speech"—it does not follow that the utterer of a profane word thereby becomes a First Amendment excommunicate, deprived of all protections of the Amendment. No more than "libel" or "obscenity" or other "mere labels,"[20] can "profanity" be given this sort of "talismanic immunity from constitutional limitations."[21] Assuming even that "damn" were profane, and profanity constitutionally punishable, it remains inconceivable, we think, that the First Amendment would permit a speaker who said "damn the Government" to be convicted of *sedition*.

The real issue, of course, is not whether "Fuck the Draft" should be labeled "profanity", but whether it can be "labeled 'speech' " for First Amendment purposes. See *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). Profane or not, it plainly is speech: the expression of a politically dissident view. So it is entitled to First Amendment protection against crim-

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[19]This reasoning may have been employed by the trial court, which expressly found that appellant's conduct was "obscene." See note 18, *supra*. Since obscenity was not an element of the offense charged, this finding was presumably thought relevant to rejection of appellant's First Amendment defenses.

[20]*New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

[21]*Ibid.*

inal charges that are inconsistent with the freedom of speech which the First Amendment guarantees (see Sections III (A), (B), *infra*), whether or not the unmade charge of profanity would be one of them. The latter question, we repeat, is not presented here.

B. The Scope of the Limitations Placed by the First Amendment Upon the Crime of Breach of the Peace.

Nor does this case properly require decision concerning the outermost limits of permissible punishment of "breach of the peace" that are consistent with the First Amendment—the question, in other words, of the exact circumstances, if any, under which a State can constitutionally punish speech upon the basis of its tendency to incite or arouse violence.

The exquisite difficulty and complexity of that question should be obvious. Speech (or non-violent expressive conduct) may tend to lead to violence in either of two basic situations or some combination of them: where it incites persons sympathetic to the speaker to act violently in furtherance of his message; or where it arouses persons hostile to the speaker to react violently against the message. Perhaps the two situations are constitutionally equivalent; but perhaps, also, they ought not to be.

In both basic situations, there are several other parameters that may be given constitutional significance. *First*, the tendency of a speech to create violent reaction (pro or con) may be attributable more or less to the speaker's ideas themselves, or to the form of their expression (which may be more or less necessary to its effectiveness), or to the speaker's

person, or to some "signal" aspect of his speech, or of his person, or of the situation. *Second*, that tendency may be more or less strong; and its strength may be measured in differing ways: by *how likely* it is to incite to violence; by *how immediately* it is likely to incite to violence; by *whom* it is likely to incite to violence (the "average" man or the excitable; hypothetical men or those actually present; men fired by zeal for constitutional ideals, or those who would as like as not bust an uppity black or a shaggy youth in the nose). *Third*, the violence itself may be more or less serious; and it may be more or less preventible by police action directed against the violent persons as distinguished from the speaker. *Fourth*, the violence may be more or less foreseeable by the speaker; and it may be desired and intended by him, or it may be profoundly undesired—a risk reluctantly incurred as the price of his peaceful speaking-out.

We believe that proper First Amendment standards regulating the punishment of speech on grounds of its tendency to lead to violence must take account of all these dimensions. At the least, in the situation where the violence feared is that of hostile hearers, we think that speech cannot constitutionally be punished unless: (1) something in the form or circumstances of the speech, not integral to communication of the thought that the speech expresses, (2) creates a clear and present danger of imminent substantial violence (3) that cannot be controlled by police action aimed at the sources of violence rather than at the speaker; and unless (4) the speaker actually intends to pro-

voke violence, and (5) uses words or actions clearly of the sort that would provoke violence in an ordinary, law-abiding man.

While we think that each of these standards is supported by decisions of this Court,[22] and that all

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[22]The first standard limits punishment to cases in which the manner, not the ideological content, of speech is provoking. For, "'[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,' *Street v. New York*, 394 U.S. 576, 592 (1969), . . . or simply because bystanders object to peaceful and orderly demonstrations." *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970).

The second standard requires clear and present danger of imminent, substantial violence. The "clear and present danger" test is the one consistently approved by this Court in various situations where criminal liability is sought to be attached to speech upon the sole ground that the speech may lead to harmful non-speech consequences. E.g. *Wood v. Georgia*, 370 U.S. 375, 384-385 (1962); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-273 (1964). Use of the test in this class of offenses, to measure the requisite relationship between speech and the feared harmful consequence, was recognized even in Chief Justice Vinson's opinion in *Dennis v. United States*, 341 U.S. 494, 503-511 (1951). And the "clear and present danger" formulation was expressly applied to describe the permissible boundaries of punishment of speech as a breach of the peace in *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

That the harmful consequence must also be "imminent" is clear. See *Garner v. Louisiana*, 368 U.S. 157, 169 (1961); cf. *Herndon v. Lowry*, 301 U.S. 242, 258-261 (1937); and compare *Yates v. United States*, 354 U.S. 298, 318-327 (1957). We think that it likewise must be substantial, for not every minor public inconvenience warrants abridgment of First Amendment freedoms, even where it is shown to flow directly and immediately from their exercise. E.g., *Schneider v. State*, 308 U.S. 147, 162 (1939).

The third standard requires that the police attempt first to restrain the heckler, and that they turn to the speaker only when and if the heckler cannot otherwise be restrained. See, *e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 236-237 (1963); *Cox v. Louisiana*, 379 U.S. 536, 550-551 (1965).

The fourth standard requires a showing of specific intent to provoke violence. This requirement serves the same necessary protective function in breach-of-the-peace cases as the requirement of *scienter* in obscenity cases, *Smith v. California*, 361 U.S. 147

of them are necessary to guard against the demonstrated dangers of repression of free speech by the breach-of-the-peace laws,[23] we recognize that their comprehensive enunciation would go significantly beyond anything the Court has yet said on the subject. On the other hand, rejection of any of these standards would also plow new ground and, we believe, sow the seeds of incalculable mischief. We have stated what we believe to be the minimally acceptable constitutional tests, not to urge their adoption in the present case, but to indicate the complexity of the issues involved in their formulation. The present case, plainly, does not lend itself to resolution of those complexities.

This is so not merely because narrower and simpler grounds compel reversal (Part III, *infra*), but also because the contours of California's breach-of-the-peace law, Penal Code §415, are unclear in several relevant dimensions. Following the decisions of all of the lower courts in appellant's case, the California Supreme Court announced the first authoritative construction of §415. *In re Bushman*, 1 Cal.3d 767, 463 P.2d 727, 83 Cal.Rptr. 375 (1970). That court said:

> "[The relevant part of §415] provides: 'Every person who maliciously and willfully disturbs the

(1959), and the requirement of actual malice in libel cases, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The fifth standard requires that provocation, to be punishable, be "so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)." *Street v. New York*, 394 U.S. 576, 592 (1969). See also *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970).

[23] See pp. 3-8 *supra*.

peace or quiet of any . . . person . . . by tumultuous or offensive conduct . . . is guilty of a misdemeanor.' The terms 'disturb the peace' and 'breach of the peace,' which are substantially synonymous, have long been understood to mean disruption of public order by acts that are themselves violent or that tend to incite others to violence. Thus, one may be guilty of disturbing the peace within that part of section 415 if he engages in 'tumultuous' conduct, i.e., violent conduct that wilfuly [sic] and maliciously endangers public safety or order. He may also be guilty of disturbing the peace through 'offensive' conduct if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (*People* v. *Cohen* (1969) 1 Cal.App.3d 94, 101 [the instant case].

". . . that part of Penal Code section 415 in question here makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.

". . . [It] does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence. . . ." (1 Cal.3d, at 773-774, 463 P.2d, at 730-731, 83 Cal.Rptr., at 378-379.)

The *Bushman* opinion thus appears to adopt a "clear and present danger" test to describe the nexus between non-violent speech and feared violent consequences that is required before the speech can be punished as provocative of the consequences under §415. But even this explicit statement is cast in doubt by

alternative formulations ("likely to incite," "threatens to incite") which do not smack of "clear and present danger"—and by citation of the present case wherein, as we shall see (Section III (B) *infra*), appellant's conviction neither was nor could have been based on a finding of "clear and present danger" of violence. Beyond this, *Bushman* is unilluminating concerning the scope of §415: whether, for example, the section punishes one whose ideas, as distinguished from the form or circumstances of their expression, are provocative in the requisite degree; whether, in this or other regards, there is any distinction to be drawn between provoking a sympathetic response and provoking a hostile one; whether the response whose provocation is punishable is limited by any requirement of imminence, or seriousness, or reasonableness on the part of the respondent, or unamenability to police control; whether, finally, the provocation needs to be intentional, or whether the stated requirements of "wilfulness" and "maliciousness" refer merely to the fact of utterance of speech that is subsequently adjudged provocative.

Without some clearer definition of the crime denounced by §415, we suggest that it would be profitless and ill-advised for this Court to grapple with broad questions of its constitutionality, or to undertake the difficult task of formulating ultimate constitutional standards that breach-of-the-peace legislation of its general sort must meet. Rather, this case should be decided upon narrower and surer grounds. And if such a limited disposition is made, we strongly hope

that the same considerations will urge the Court to avoid any possible intimation of approval of §415. For, as we have seen, both the statute and the constitutional issue that it implicates are full of nettles.

III. THE GROUNDS FOR REVERSAL

We come now to the grounds upon which reversal of appellant's conviction is required. They are two:

A. At the time of appellant's trial and conviction, the relevant portion of Penal Code §415 had not been authoritatively construed by the California appellate courts. In terms, it was plainly overbroad and unconstitutional. Since there is no reason to suppose that the trial court read it other than literally, appellant's conviction must be reversed.

Appellant was charged in relevant part with "disturb[ing] the peace and quiet of the neighborhood . . . and [of some] . . . persons . . . by offensive conduct." (A. 1.) Prior to September 27, 1968, when he was tried and convicted, this portion of Penal Code §415 had not been interpreted by the California courts. It was first explicated by the District Court of Appeal upon appellant's own appeal, a year after his conviction; still later, in January 1970, the California Supreme Court first dealt with a charge of "offensive conduct." *In re Bushman, supra.*

As written, that portion of §415 is quite clearly overbroad and unconstitutional under familiar First Amendment principles. *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949); *Edwards* v. *South Carolina*, 372

U.S. 229 (1963); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Bachellar* v. *Maryland,* 397 U.S. 564 (1970); and see *Ashton* v. *Kentucky,* 384 U.S. 195, 200-201 (1966). Without distinction between ideological and other disturbances—both comprehended within the traditional concept of disturbing the peace[24]—it punishes any disturbance of the peace of another by conduct defined only as "offensive." "But '[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,' *Street* v. *New York,* 394 U.S. 576, 592 (1969)." *Bachellar* v. *Maryland, supra,* 397 U.S., at 567.

The District Court of Appeal below held that appellant's display of the language "Fuck the Draft" was "offensive" because of its tendency to "cause others to rise up to commit a violent act against the person of [appellant] . . . or attempt to forceably remove his jacket." (A. 29.) However, there is no reason to believe that the trial court took this limited view of the notion of offensiveness, or that it thought appellant's escutcheon was "offensive" only in this sense. Particularly since evidence of any "violent act" or the probability of any "violent act" is entirely lacking on this record—and since the trial judge explicitly held that "a conviction under Section 415 for the mere display of the words 'Fuck the Draft' unconnected with any actual or threatened violence does not [vio-

[24]See the *Terminiello, Edwards, Cox* and *Bachellar* cases just cited; and see *Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940).

late the] . . . Constitution" (A. 20)—it is far more plausible to suppose that he found appellant's jacket "offensive" in a broader and more obvious sense which (however much one may privately agree with it) cannot constitute a public crime either under §415 as latterly construed or under the Constitution of the United States. For this reason, *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 91-92 (1965), palpably compels reversal. See also *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966).[25]

B. No factual finding has been made, and the record will not support a finding, of a constitutionally requisite element of the crime of which appellant was convicted: that is, a tendency of his non-violent expression to create violence. The Court of Appeal apparently concluded that "Fuck the Draft," per se, is presumptively likely to lead to violence. This is rationally and constitutionally untenable; and appellant's conviction must be reversed.

We have noted above that the California Supreme Court's construction of §415 in the *Bushman* case ap-

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[25]We have considered whether, in the circumstances of this case, a remand to the California courts for reconsideration in light of *Bushman* would be appropriate. We are clear that it would not. This Court cannot remand to the California Supreme Court, nor can it compel that court to exercise its discretionary jurisdiction in the matter. The California Supreme Court has had the chance to consider this case, and has advisedly refused to hear it. Remand to the Court of Appeal for reconsideration in light of *Bushman* would be an obvious exercise in futility. For, in view of the approving citation of its present decision in the *Bushman* opinion, the Court of Appeal would quite properly conclude that there is nothing to reconsider. *Bushman* does not purport to modify the California law of §415 as pronounced in *Cohen*, but to confirm it. In this situation, outright constitutional reversal by this Court is the only appropriate course.

pears to require that non-violent conduct, in order to constitute a punishable disturbance of the peace, must create a "clear and present danger" of violence. Whether or not that requirement is a constitutional one (and we have also said above that we think it is[26]), plainly both §415 and the First Amendment require *some* substantial tendency of speech to provoke violence before that speech may be punished on a breach-of-the-peace theory. The Court of Appeal below admitted that §415 reaches only such non-violent conduct as "has a tendency to provoke *others* to acts of violence or to in turn disturb the peace and quiet" (A. 28-29; emphasis in original). There can be no doubt that, in the absence of such a tendency, the Constitution would prohibit the application of §415 to any form of non-violent speech. E.g., *Cox v. Louisiana*, 379 U.S. 536, 549-550 (1965); *Street* v. *New York*, 394 U.S. 576, 592 (1969).

The trial court, of course, made no finding of any such tendency in appellant's case; for it thought, erroneously, that "the mere display of the words 'Fuck the Draft' unconnected with any actual or threatened violence" (A. 20) was punishable. Nor was any evidence introduced which might support a finding that appellant's conduct tended to incite or provoke anyone to any form of violent reaction.[27]

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[26]See note 22, ¶2 *supra*.

[27]"No evidence was offered by the People indicating or tending to indicate that Defendant either engaged in or threatened any acts of violence, or was about to engage in any such acts, or that Defendant by his conduct incited anyone else to any acts of violence, or that any persons observing Defendant engaged in or threatened, or were about to engage in acts of violence." (A. 19.)

Appellant's conviction, therefore, must stand upon the unvarnished proposition, invented by the Court of Appeal, that to wear a jacket labeled "Fuck the Draft" in public, in the presence of women and children (and, apparently, of their adult male protectors), *presumptively* will lead to violence. This proposition is posited not merely as a permissible inference from evidence—since the trial court drew no such inference—but as a presumption which supplies the place of both evidence and inference.

This Court has had frequent occasion to examine the use of presumptions of the sort, through which conduct protected by the Constitution is transmuted by say-so into something else in order to make it punishable. If indulged, this kind of presumption would make all constitutional rights defeasible by fiat. *Bailey* v. *Alabama*, 219 U.S. 219, 239 (1911); and see, e.g., *Morrison* v. *California*, 291 U.S. 82 (1934); *Taylor* v. *Georgia*, 315 U.S. 25 (1942). So, particularly where the rights that they may overreach are the "vulnerable [and] . . . supremely precious" ones guaranteed by the First Amendment,[28] such presumptions must be strictly scrutinized. E.g., *Wood* v. *Georgia*, 370 U.S. 375, 386-389 (1962); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 283-288 (1964); *Dombrowski* v. *Pfister*, 380 U.S. 479, 494-496 (1965). Specifically, this Court has time and again carefully reviewed, and invariably upset, state court presumptions that particular sorts of speech would, *per se*, lead to violence. *Fiske* v. *Kansas*, 274 U.S. 380 (1927); *Garner* v. *Lou-*

[28] *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

isiana, 368 U.S. 157 (1961); *Taylor* v. *Louisiana*, 370 U.S. 154 (1962); *Cox* v. *Louisiana*, 397 U.S. 536, 549-550 (1965); *Street* v. *New York*, 394 U.S. 576, 592 (1969).

The presumption that public display of the words "Fuck the Draft" will cause violence does not survive scrutiny under a test of mere rationality, let alone the heightened scrutiny required by the First Amendment. Doubtless many men would be indignant at having their wives or children exposed to these words. We certainly would. But it would never occur to us—or, we suggest—to any ordinary-tempered man, to react with violence against the sign-bearer. If we undertook to fight every man who said or displayed the word "fuck" or equally embarrassing words in public, we would be fighting most of the time. Only gallantry or irascibility of pathological proportions could inspire such a crusade. Clearly, the Court of Appeal has set the boiling-point of violence much too low—or appraised the likelihood of its being reached much too high—to satisfy reason or the First Amendment.

The dangers of this approach for suppression of free expression are obvious. For if "Fuck the Draft" is *per se* punishable in Los Angeles—not as profanity but because of its presumed likelihood to lead to violence—so, *a fortiori*, is "End the War" in down-town Manhattan, or "Black is Beautiful" in Memphis, Louisville or Jackson. Free speech is not, we think, so lightly to be stifled upon the basis of vagrant fears of unreasonable, hostile reaction.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

PAUL N. HALVONIK,
CHARLES C. MARSON,
ANTHONY G. AMSTERDAM,
Attorneys for the American Civil Liberties Union of Northern California.